101ST CONGRESS
*1st Session*
HOUSE OF REPRESENTATIVES
REPORT
101-3

# EASTERN AIRLINES LABOR DISPUTES EMERGENCY BOARD

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MARCH 13, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. ANDERSON, from the Committee on Public Works and Transportation, submitted the following

# REPORT

together with

## ADDITIONAL AND MINORITY VIEWS

[To accompany H.R. 1231]

[Including cost estimates of the Congressional Budget Office]

The Committee on Public Works and Transportation, to whom was referred the bill (H.R. 1231) to direct the President to establish an emergency board to investigate and report respecting the dispute between Eastern Airlines and its collective bargaining units, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. CREATION OF EMERGENCY BOARD.

Subject to section 2, the President shall create, not later than 1 day after the date of the enactment of this Act, a board to investigate and report to the President respecting the disputes between Eastern Airlines and the International Association of Machinists and Aerospace Workers, the Air Line Pilots Association, and the Transport Workers Union of America.

SEC. 2. APPLICABILITY OF RAILWAY LABOR ACT.

(a) GENERAL RULE.—Except as provided in subsection (b), creation of the board under section 1 shall be in accordance with and subject to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160).

(b) EXCEPTIONS.—

(1) REPORT DEADLINE.—The period after the date of creation of the board pursuant to section 1, by which the board must make its report to the President under the first undesignated paragraph of section 10 of the Railway Labor Act,



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shall be 14 days instead of 30 days. Upon request of the Board, the President may extend such 14-day period for not to exceed 5 additional days.

(2) POST REPORT PERIOD.—The period referred to in the third undesignated paragraph of section 10 of the Railway Labor Act after the date on which the board makes its report to the President, during which no change (except by agreement) shall be made by the parties to the controversy and the conditions out of which such dispute arose, shall be 7 days instead of 30 days.

(3) MAXIMUM PERIOD LIMITING CHANGES IN CONDITIONS.—Notwithstanding paragraphs (1) and (2), the maximum period after the date of creation of the board, during which no change (except by agreement) shall be made by the parties to the controversy in the conditions out of which the disputes referred to in section 1 arose, may not exceed 21 days; except that, if the President extends the 14-day period under paragraph (1), such 21-day period shall be increased by the number of days of such extension.

The reported bill, H.R. 1231, establishes a framework to facilitate resolution of the long-standing dispute between Eastern Air Lines and its unions. Eastern is now in Chapter 11 bankruptcy proceedings and operating only limited service, following a March 4 strike by the International Association of Machinists, and supporting actions by Eastern's pilots and other employees. Unless the labor disputes can be resolved promptly, Eastern is unlikely to be able to reorganize and resume operations as a major airline.

Eastern's demise would have serious effects, on its owners, its creditors, its 30,000 employees, the cities where its employees are based, and on the traveling public. Eastern is one of the few major airlines remaining in the concentrated air transportation industry. If Eastern does not survive, there is no assurance that Eastern's service will be replaced with service by new carriers which do not already serve Eastern's markets. Loss of the competitive air service now provided by Eastern could undermine the low fares and other consumer benefits of airline deregulation.

## BACKGROUND

Although there were periods of troubled labor relations before Texas Air acquired Eastern, the period since the acquisition has been dominated by severe acrimony between the new management and Eastern's unions. The purpose of briefly recounting this history is not to take sides in the disputes, or to express a view on how the disputes should be resolved, but only to establish the background for the deep divisions now existing between labor and management.

Texas Air acquired Eastern in November of 1986. New management was installed with the announced objective of restoring Eastern's profitability, primarily by realizing reductions in the company's labor costs.

From the outset there was severe acrimony between the new management and Eastern's unions. After an FAA investigation of Eastern, Administrator McArtor reported to the Secretary of Transportation in May 1988 that the FAA found that Eastern's "management and employees alike exhibited a long-held deep feeling of internal distrust and a near total lack of constructive communication . . . both sides have stated that they are 'at war' ". The FAA also found that the discord and complexity of the labor-management dispute at Eastern was much deeper and more intense than had been the case at other carriers with labor disputes. Hear-

ings held by the Aviation Subcommittee on March 7, 1989, indicated that the severe acrimony has continued to this day.

There appear to be several causes for the labor management tension at Eastern. The first involves management's day to day relations with employees. As summarized by DOT after its investigation in May, 1988:

> The Barlow Group (of FAA) and virtually every officer and employee interviewed at Eastern noted the palpable labor-management tension at the company. Management views labor generally as undisciplined and the company's "corporate culture" as unconductive to efficiency and profitability. Pre-Texas Air management, in the view of current officers, permitted abuse of work rules, thus losing labor's respect. Present management's attempts to increase accountability are viewed by the employees as punitive, intimidating, and vindicative.

Another cause of management-labor tension has been Eastern's actions to downsize the company and sell valuable assets. Eastern has justified these transactions as a necessary program to build liquidity for a strike. The unions have interpreted the transactions as efforts to break the union by increasing the profitability of Texas Air (and the largely non-union Continental) at the expense of Eastern, by putting pressure on the employees to agree to wage cuts, and by taking the most valuable assets out of the company and wrecking the compnay financially, making it a candidate for a liquidation.

The transactions in questions included the sale of Eastern's computer reservation system marketed to travel agents, System One, to a separate subsidiary to Texas Air for a one hundred million dollars note due in 2012 bearing interest at six percent; the sale of Eastern's aircraft, gates, and slots to Continental; the payment of management fees by Eastern to Texas Air; an effort to transfer the Eastern Air Shuttle to a separate Texas Air subsidiary for $225 million dollars of which $125 million was to be paid in cash (This transaction fell through after it was enjoined by the courts, following which Eastern entered into an agreement to sell the shuttle to Donald Trump for $365 million); and the payment of fees by Eastern to a subsidiary of Texas Air for the purchase of fuel. In addition, by the end of 1988 Eastern had laid-off 13,000 employees and sold or more than 10% of its fleet (and grounded additional aircraft) since the acquisition by Texas Air. Further downsizing occurred in the first two months of 1989.

A final source of labor-management tension has been by the collective bargaining process itself, which has failed to produce any agreements and culminated in a strike and a bankruptcy filing by the company.

The most protracted negotiations have been between Eastern and the International Association of Machinists and Aerospace Workers (IAM), which represents aircraft mechanics and ground service personnel (aircraft cleaners, baggage handlers, and fuelers). At the time of the strike IAM represented approximately 8,500 Eastern employees.

The collective bargaining agreement between Eastern and the IAM expired on December 31, 1987. Negotiations under the auspices of the National Mediation Board (NMB) began in November 1987 and there has been little apparent progress towards agreement.

In the IAM negotiations Eastern has been seeking wage benefits and reductions totaling approximately $125–$150 million a year. Eastern has proposed that most of these reductions come from cuts in the pay of baggage handlers, fuelers, and aircraft clearners. The proposed reductions for aircraft mechanics have been proportionately less. Eastern has also proposed to pay for the training of non-mechanic IAM members to become qualified as mechanics, and eligible for higher paying jobs, to the extent these become available.

Eastern supports their proposals by pointing to the company's losses of more than a billion dollars since deregulation including net losses of $182 million in 1987 and $335 million in 1988. Eastern believes that the wages it pays to IAM employees are out of line with what other airlines pay to similar employee. Eastern believes that the current wage levels make it impossible for it to compete and make a profit in the deregulated airline industry.

The machinists take strong exception to Eastern's position and do not want to have reductions of wages or benefits for their current members. The union has asked for some wage increases. They have also proposed lower wage rates for new entry workers and work rule changes for increased productivity, which they believe would reduce Eastern's costs.

The IAM believes that the reason for Eastern's lack of competitiveness and profitability is not so much its labor costs but that the company has been poorly managed for a long period of time. IAM points out that Continental, which is also part of Texas Air, lost almost as much as Eastern last year, despite Continental's low labor costs (Continental had net losses of $258 million in 1987 and $315 million in 1988). As discussed above, the IAM, also believes that the current owners and managers of Eastern have taken valuable assets, such as the computer reservation systems, out of Eastern to the airline's financial detriment.

There are also substantial disagreements in the negotiations between Eastern and its pilots and flight attendant units. These cointracts expired on December 31, 1988.

The negotiations with the IAM went through the full mediation procedures required by the Railway Labor Act culminating in a 30-day colling off period which expired on March 3, 1989. At the end of the cooling off period the IAM went on strike and the strike was supported by pilots and flight attendants.

The strike does not appear to have resulted in any softening of positions. As was stated by the Secretary of Transportation in his testimony before the Aviation Subcommittee on March 7, the parties to the negotiation are nowhere near agreement and, in fact, are "even further apart today" than they were at earlier stages of the dispute.

Other testimony presented at the hearing supports the Secretary's analysis. In the climate of mutual distrust it is hard to see how an agreement can be reached by the parties themselves, without outside assistance.

## NEED FOR LEGISLATION

H.R. 1231 directs the President to appoint a board to study the disputes between Eastern and its unions and to make recommendations on the terms on which the dispute might be resolved. During the 14 days in which the board is considering its recommendations [1] and for a period of 7 days thereafter, the parties to the dispute would be required to take all necessary steps to restore and preserve the conditions out of which the dispute arose, as such conditions existed before 12:01 A.M. on March 4, 1989. This would mean, among other things, that the most recent IAM contract would continue in effect and that the IAM would not be permitted to continue its strike.

H.R. 1231 directs the President to take steps which the President could take at any time as a matter of discretion. Under Section 10 of the Railway Labor Act, the President can appoint an emergency board, if the National Mediation Board so recommends on the basis of a finding that a dispute "threatens substantially to interrupt interstate commerce to a degree, such as to deprive any section of the country of essential transportation service." In the present case the National Mediation Board recommended that the President appoint a board, but the President has refused to do so. This refusal is unprecedented. In the more than 30 previous airline disputes in which NMB has recommended appointment of a board, the President has always followed the NMB recommendation.

The Committee believes that the appointment of a board would improve chances that the dispute between Eastern and the unions could be resolved and that the company could reorganize in bankruptcy and continue as a major carrier. In view of the mistrust and ill-will which has been generated in the labor disputes, there appears to be little prospect that the company and the unions could reach agreement through ordinary collective bargaining negotiations.[2] On the other hand, we believe that there is a resonable possibility that the parties would be able to agree to accept the recommendations of an impartial board. As the union representatives pointed out at the Aviation Subcommittee on H.R. 1231, the unions have supported appointment of a Presidential board and this would make it difficult for the union to refuse to accept the board's recommendations. The company might also find it more palatable to accept the recommendations of an independent board. Morever, if the parties are not willing to accept a board's recommendations voluntarily, it would be possible for Congress to pass legislation requiring that these recommendations be accepted. Such legislation has been passed in a number of disputes involving the rail industry.

If Eastern's labor disputes can be resolved and Eastern can survive as a major carrier, there will be substantial public benefits. The survival of Eastern will avoid the loss of up to 30,000 jobs and

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[1] The bill provides that the 14 days may be extended for up to 5 days by the President, upon request of the board.

[2] However, the appointment of a board would not prevent the parties from reaching agreement voluntarily. Under H.R. 1231 and Section 10 of the Railroad Labor Act, the parties are free to negotiate while the board is sitting and to reach a collective bargaining agreement at any time.

will also help avoid substantial economic damage to the communities in which Eastern's employees are based. Eastern's survival would also prevent adverse effects on consumers from the loss of Eastern's competitive air service and the effect of decreased competition on airline service and fares.

In recent years, there has been increasing concern about the loss of competition in the domestic air transportation industry. In the last few years there have been 10 mergers of major airlines. Of 22 new airlines entering the domestic market since deregulation, only five are still operating as separate carriers. In 1987 the market share of the top eight carriers was 91%, a substantial increase from the 74% share of these carriers in 1983.

In hearings later this year the Aviation Subcommittee will be considering in-depth the effects of this increased concentration on the traveling public. For present purposes, the important consideration is that the demise of Eastern as a major carrier could lead to further reductions in competition, jeopardizing the low fares and improved service which has been made possible by airline deregulation.

Eastern plays a critical role in existing airline competition. Eastern is the country's sixth largest airline carrying 35.6 million passengers in 1988,. 7.5% of total domestic traffic. Before the strike, Eastern was operating 250 large jet aircraft between 80 U.S. cities and between the U.S. and 38 cities in the Caribbean, Mexico and Latin America.

Eastern is a major carrier in many markets in the eastern United States. To cite just a few examples, for the first three quarters of 1988 Eastern carried 57% of the LaGuardia-Boston and the New York-Washington markets, 52% of the Miami-Atlanta market, and 67% of the New York-Miami market. Eastern is a major carrier at many large and small cities. For example, for the first three quarters of 1988 Eastern had the following shares of the total traffic carried by all carriers serving the airport: Atlanta (36%), Miami (41%), LaGuardia (22%), Washington National (22%), Boston (18%). Gainesville (79%), Pensacola (37%), and Greenville-Spartanburg (36%).

If Eastern is not able to resume operations as a major carrier, the company's assets will be liquidated in bankruptcy. There is no assurance that the purchaser or purchasers of the assets will duplicate Eastern's important competitive service. To the extent that Eastern's assets were acquired by companies already serving Eastern's routes, there would be one less carrier and a loss of competitive service. Even if Eastern's assets were purchased by carriers which were not competing with Eastern before the strike, there is no assurance that the end result would be a pattern of competitive service as extensive and as effective as that which Eastern provided. In short, the demise of Eastern could mean a major loss of competition and could deprive many passengers of consumer benefits of airline deregulation. Every effort must be made to prevent this from occurring.

We now turn briefly to some of the arguments which have been made against H.R. 1231.

First, it has suggested that appointment of a Presidential board, with the accompanying requirement that the unions return to

work under their last contract, would worsen Eastern's financial position and make it more difficult for the company to reorganize.

This contention appears to assume that H.R. 1231 would require Eastern to immediately take back all of the union members, even though since the strike the company has reduced its workforce from 30,000 to 1,500. This is not the case. H.R. 1231 only requires (as provided in Section 10 of the Railway Labor Act) that the parties go back to the contract under which they operated before an impasse was reached.

Under H.R. 1231 Eastern would retain the rights it had under its contracts to lay off employes when required by a decline in business. In addition, if the labor costs become unduly burdensome to Eastern, the bankruptcy law itself provies procedures for the bankruptcy judge to approve changes in labor contracts to preserve the company's assets.

Questions have also been raised about whether it is appropriate to have the Presidential board review all pending disputes or whether the review should be limited to the IAM dispute in which an impasse has been declared by the National Mediation Board. The Committee believes that in order to develop a solution which would facilitate the survival of Eastern, it is necessary to have a comprehensive settlement of all pending labor disputes.

We reject the suggestion that by covering all disputes H.R. 1231 would deprive pilots and flight attendants of their rights under the Railway Labor Act. In the first place, the pilots' and flight attendants' representatives are strong proponents of having a Presidential board review their disputes. Moreover, the convening of a Presidential board does not deprive the parties of their right to collectively bargain during the period the board is sitting. And if the Presidential board process does not result in a settlement of the disputes, Eastern and the pilots and flight attendants would be returned to the legal position they were in before the board was convened, and would be required to resume collective bargaining. There would have to be a further determination by the National Mediation Board before the parties were free to engage in self-help.

It has also been argued that it is unrealistic to expect the board to complete its work in the 14–19 days allowed by H.R. 1231. The Committee recognizes that this time frame will place great demands on the board. However, the process will be facilitated by the fact that the parties have previously developed documentation for their positions in the extensive litigation and negotiation which has occurred in the past two years. The parties should be able to present their positions to the board promptly.

We also recognize that boards appointed in the past have frequently taken more than 30 days to reach their decision. However, the NMB has advised us that in most cases the extension of the 30-day period was agreed to by the parties and the President. In the Eastern emergency we are confident that the board, with the cooperation of the parties, will rise to the occasion and produce sound recommendations after expedited proceedings.

Finally, questions have been raised as to whether Constitutional problems are created by H.R. 1231 because the legislation will have effects on the compensation paid to employees of a single company which is in bankruptcy. Because H.R. 1231 applies only to one spe-

cific company it has been suggested that the bill may violate Constitutional requirements that Congress regulate bankruptcy in a uniform manner, as this requirement was interpreted in the Supreme Court's decision in Railway Labor Executive Association vs. Gibbons, 455 US 457 (1982).

The Committee has considered these arguments and concluded that H.R. 1231 is distinguishable from the legislation involved in the Gibbons case and that H.R. 1231 is not inconsistent with Constitutional requirements.

Under the analysis set forth by the Supreme Court in *Gibbons,* a key preliminary issue is whether the legislation under review was passed under Congress' Constitutional power over bankruptcy or under Congress' Constitutional power to regulate commerce. This is a critical issue because, as explained by the Court, there is requirement of uniformity under the bankruptcy clause, but no such requirement under the commerce clause.

The legislation in the *Gibbons* case was held to be action under the bankruptcy clause. In *Gibbons,* Congress was directly regulating the order of priority for liquidating assets in a bankruptcy case. The legislation specifically required the company in bankruptcy to make payments to employees and specifically prescribed that these payments would be given priority over other claimants to the assets.

By contrast, in H.R. 1231, Congress is acting under the commerce clause and trying to settle a labor dispute. H.R. 1231 does not directly deal with distribution of assets in bankruptcy. Indirectly the legislation could have some effect on Eastern's financial condition, but this effect might be positive rather than negative. In any event, the priority purpose of H.R. 1231 is to deal with a labor dispute, not with the distribution of assets. Legislation dealing with labor disputes affecting interstate commerce is an exercise of Congress' powers under the commerce clause.

From another standpoint, H.R. 1231 implements procedures in the Railway Labor Act, a statute passed by Congress under the commerce clause. If the President had implemented the Railway Labor Act procedures before Eastern's bankruptcy, it could not be claimed that the Eastern's bankruptcy changed the character of the Railway Labor Act from legislation under the commerce clause to legislation under the bankruptcy clause. The result should be no different when the Railway Labor Act procedures are implemented by legislation rather than by Presidential action. The Railway Labor Act and the legislation implementing it remain actions under the commerce clause.

For these reasons, the Committee believes that H.R. 1231 is not inconsistent with the Constitutional requirement that Congress regulate bankruptcy in a uniform manner.

## SECTION-BY-SECTION ANALYSIS

Section 1. The reported bill directs the President to create, not later than one day after the date of enactment, a board to investigate and report to the President on the dispute between Eastern Airlines and the International Association of Machinists and

Aerospace Workers, the Air Line Pilots Association, and the Transport Workers Union of America.

Section 2. This section provides that except as provided in Subsection (b) the creation of a board shall be in accordance with and subject to the provisions of Section 10 of the Railway Labor Act. The exceptions provided in Subsection (b) are that the board shall have 14 days to make its report instead of the 30 days provided by Section 10. Upon request of the Board, the President may extend the 14-day period for not to exceed 5 additional days. In addition, the reported bill establishes a period of 7 days (instead of the 30 days established by Section 10) after the board makes its report to the President, as the last part of the period during which no change can be made by the parties to the conditions out of which the dispute arose. The reported bill further provides that the maximum period during which no changes can be made in the conditions out of which the dispute arose may not exceed 21 days, plus any extension which the President grants to the 14-day period as described above.

It is the intent of the reported bill that the board appointed by the President shall terminate upon submission to the President of its report.

## COMMITTEE ACTION AND VOTE

With respect to clause 2(l)(2) (A) and (B) of rule XI of the Rules of the House of Representatives, the Committee with a majority present, favorably reported H.R. 1231, as amended, by voice vote on March 9, 1989.

Prior to Committee consideration and vote, the Subcommittee on Aviation held hearings on H.R. 1231 on March 7, 1989, and on that same day the Subcommittee on Aviation considered and reported H.R. 1231 to the Committee by a 21–12 vote.

## OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that no hearings were held by the Subcommittee on Investigations and Oversight.

With respect to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has not received a report from the Committee on Government Operations pertaining to the subject matter.

## CONGRESSIONAL BUDGET ACT REQUIREMENTS

With respect to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, and in compliance with section 308(a) of the Congressional Budget Act of 1974, the Committee reports that H.R. 1231, as reported by the Committee, does not create new budget authority and does not create new or increased tax expenditures.

With respect to clause (2)(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee has received the following report from the Congressional Budget Office under Section 403 of the Congressional Budget Act of 1974.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, March 10, 1989.*

Hon. GLENN M. ANDERSON,
*Chairman, Committee on Public Works and Transportation, House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1231, a bill to direct the President to establish an emergency board to investigate and report respecting the dispute between Eastern Airlines and its collective bargaining units, as ordered reported by the House Committee on Public Works and Transportation, March 9, 1989. CBO estimates that enactment of this bill would result in costs to the federal government of less than $25,000.

H.R. 1231 would direct the President to establish an emergency board to investigate and report respecting the dispute between Eastern Airlines and its collective bargaining units. The board would be required to make its report to the President within 14 days from the date of its creation, although the President would have the discretion to extend the 14-day period for up to 5 additional days. The President has descretion as to the number of board members and their compensation. However, based or past experiences with such emergency boards, CBO estimates that the costs associated with the board are unlikely to exceed $25,000.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
*Director.*

### INFLATIONARY IMPACT ANALYSIS

With respect to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee reports that there should be no inflationary impact on prices and costs in the operation of the national economy from enactment of H.R. 1231.

### COST ESTIMATE OF LEGISLATION

With respect to clause 7(A)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that H.R. 1231 would result in additional cost to the Federal government. An estimate of these costs by the Congressional Budget Office is included in this Report.

With respect to clause 7(A)(2) of rule XIII of the Rules of the House of Representatives, the Committee reports that no cost estimate of H.R. 1231 was submitted to the Committee by a government agency.

## ADDITIONAL VIEWS OF REPRESENTATIVE DAVID SKAGGS TO COMMITTEE REPORT ON H.R. 1231

It was not possible to sit through the hearing and mark-up on this legislation and not come away with enormous sympathy toward the employees of Eastern Airlines and the desire to do something to help. The good intentions of my colleagues who therefore support H.R. 1231 are beyond question. I too believe an emergency board could be a big help in settling the dispute between Eastern and the International Association of Machinists and I signed a letter urging President Bush to appoint such a board. However, this bill raises other issues that go far beyond whether you believe the workers at Eastern have a legitimate gripe, or whether you dislike the way Frank Lorenzo manages his companies, or whether you think it is important to try to blunt any anti-labor tendencies early in the Bush administration.

H.R. 1231 raises serious questions of constitutionality, of the appropriate use of Congressional power, and of establishing a precedent for intervention in collective bargaining disputes not yet at impasse. These questions were substantial enough in my mind to cause me to vote against reporting this bill to the House.

### CONSTITUTIONALITY

Many people may be content to leave questions of the constitutionality of legislation for the courts to decide. My reading of our oath of office dictates otherwise: that we have a duty to oppose legislation which is unconstitutional and to avoid imposing the terrible costs of litigating constitutionality on the persons affected by our acts.

In this case, the issue derives from clause 4 of section 8 of Article I of the Constitution, which empowers Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States" (the "uniformity clause"). With the Chapter 11 filing by Eastern on the morning of March 9, the question arose as to whether the creation of a Presidential Emergency Board ("PEB") pursuant to this legislation would interject a *non*uniform element into the Eastern bankruptcy in violation of the uniformity clause. By proceeding to vote on this bill on the afternoon of March 9, we left little time for analysis of that question.

The controlling case on point is *Railway Labor Executives Assn.* v. *Gibbons,* 455 U.S. 457 (1982). The Supreme Court found that provisions of the Rock Island Railroad Transition and Employees Assistance Act ("RITA"), as reenacted by the Staggers Rail Act of 1980, violated the uniformity clause. In reaching that conclusion, the Court made several comments that are relevant to the situation we face in passing this bill while the Eastern bankruptcy is pending.

"The conclusion is thus inevitable that RITA is not a response either to the particular problems of major railroad bankruptcies or to any geograhically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad." 455 U.S. at 470. "Albeit on a rather grand scale, RITA is nothing more than a private bill such as those Congress frequently enacts under its authority to spend money. . . . A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor. . . . The employee protection provisions of RITA therefore cannot be said to 'apply equally to all creditors and all debtors.' " 455 U.S. at 471.

Now the point is made in defense of H.R. 1231 that, unlike RITA, its effect would not be to force a particular preference in distribution of assets on the Eastern bankruptcy court. All it is said H.R. 1231 would do is require Eastern to pay at their pre-strike wages these employees it chooses to employ during the time the PEB is considering the matter. To argue, however, that this would not affect the distribution of assets in the bankruptcy proceedings is, I'm afraid, to elevate form over substance. Surely the Congressional mandate of specific wage scales for a time will have a very direct impact on the assets of the company in bankruptcy and so on the right of other creditors. Thus, to use the words of the Court in *Gibbons,* "To hold otherwise would allow Congress to repeal the uniformity requirement from Art. I, sec. 8, cl. 4, of the Constitution." 455 U.S. at 473.

I can't be certain that this is the correct constitutional analysis. But it's the best I can do in the time which has been made available to examine the issue. And that's part of the problem.

APPROPRIATENESS

Even if we put the constitutional question to one side, we still have to ask whether this bill at this time makes sense as an exercise of Congressional power. That's obviously a different question from whether you think (as I do) just a PEB would be a good thing. It has to do with means, not just ends.

The President had the clear authority under section 10 of the Railway Labor Act (45 U.S.C. 160) to appoint an emergency board, or PEB, in the Eastern-Machinists dispute, at least under the circumstances that existed prior to the March 9 bankruptcy filing. The National Mediation Board (NMB) recommended he do so. I joined many colleagues in writing to the President on March 2 to urge him to take that action. On March 3, the President announced that he would not create a PEB, and he has reiterated his opposition to the idea several times since.

H.R. 1231 now presents us with the extraordinary propositon that we should pass a bill to order the President to take a specified action in a particular collective bargaining dispute, when he already has the authority to do so and has expressly declined to act. Do we have any realistic prospect that this bill will accomplish its stated objective of getting a PEB appointed, given that the President has already refused once and can veto this legislation aimed at changing his mind? I do not understand what we hope to accom-

plish, other than a somewhat gratuitous confrontation between legislative and executive branches. Who knows what the consequences of that might be? It's not immediately clear to me that they would be positive, especially for the interests of those whom H.R. 1231 is presumably intended to benefit.

Any political entity has limited effective energy and credibility to expand. I'd rather not expend ours on this undertaking, faced as it is with a veto at best, and a finding of unconstitutionality at worst.

PRECEDENT

It's critical to note that H.R. 1231 does more than mandate creation of a PEB to address only the dispute between Eastern and the Machinists. It would also have the PEB deal with the pilots' (ALPA) and the flight attendants' (TWU) disputes, even though those disputes have not reached impasse and have not been the subject of NMB mediation. Inclusion of the two other unions is rationalized on the appealing grounds that they don't object and that it would be inefficient to have a PEB resolve the problem between the company and the machinists if the other disagreements were allowed to persist. That may be true, but it misses an important point.

During mark-up, it was conceded that no precedent exists for pre-empting normal collective bargaining under the Railway Labor Act as to parties not yet at impasse. It's not enough that the unions affected have expressed their consent; a waiver of normal rights and procedures usually requires the assent of all parties involved, even one as disliked as the owner of Eastern. It's also not enough to claim efficiency; nobody ever said collective bargaining was supposed to be neat, tidy and designed to avoid the frustration and delay of hashing out multiple disputes between several unions and a single company.

On the other hand, we would be taking a step with truly unknowable and dangerous repercussions to intercede in the pilots' and flight attendants' controversies with Eastern at this juncture. What standards are we really applying here? What message does it send to the parties to future disputes who might want to seek Congressional intervention at earlier and earlier stages, rather than trying to settle matters through the proven, it messy, processes of collective bargaining? Until someone can answer these and many other questions, passage of this bill is not well-advised.

I really regret having to reach these conclusions. I would like to be able to help get Eastern flying again and Eastern's employees at work again and Eastern's customers to their destinations again. This bill is not the answer.

DAVID E. SKAGGS.

## MINORITY VIEWS OF MESSRS. JOHN PAUL HAMMERSCHMIDT, BUD SHUSTER, ARLAN STANGELAND, NEWT GINGRICH, BILL CLINGER, BOB McEWEN, THOMAS E. PETRI, RON PACKARD, JIM LIGHTFOOT, DENNIS HASTERT, JIM INHOFE, CAS BALLENGER, FRED UPTON, BILL EMERSON, LARRY CRAIG, JOHN DUNCAN, JR., MELTON HANCOCK, AND CHRISTOPHER COX

This legislation would mandate the establishment of a Presidential Emergency Board (PEB) under the Railway Labor Act (45 U.S.C. 151) to deal with the dispute between Eastern Air Lines and its unions. In our view, the establishment of such a Board is not justified on either legal or policy grounds.

Under the Railway Labor Act (RLA), the President has the discretion to appoint a PEB if the labor dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." Since the late sixties, the government has not viewed a single-carrier strike in the airline industry as threatening such an interruption. This was, no doubt, due to the fact that other carriers were available to provide the essential transportation services.

What was not justified then is even less justified now. Since the advent of airline deregulation, airlines have been free to adjust their routes in response to passenger demand. Indeed, in this case, some airlines have increased their flights to accommodate passengers. Others already fly Eastern's routes and have accepted the tickets of Eastern's passengers. Although there is certainly inconvenience to passengers, there is not the deprivation of essential transportation service that would justify a PEB under the statute.

We recognize that the use of secondary picketing, which some unions have threatened, could cause the sort of disruption that the statute was meant to prevent. If a serious disruption in transportation occurs as a result of secondary picketing, however, the appropriate solution is to prohibit such picketing rather than to establish a PEB. The Nation's economy and the movement of its people and goods should not be hostage by the picketing of companies that have nothing to do with the dispute. This could not be done in any other American industry because Federal labor laws put severe restrictions on this sort of secondary picketing. Thus, the way to prevent the disruption created by secondary picketing is to eliminate secondary picketing.

Notwithstanding the fact that the law speaks only in terms of disruption of commerce, proponents of a PEB urge adoption of this legislation in order to save Eastern Air Lines and prevent the disruption to its employees that would be caused by the loss of their jobs. We share their fervent hope for the survival of Eastern and feel just as deeply for the agony being experienced by Eastern's

many fine employees. However, we believe their faith in a PEB as the way to solve this problem is sorely misplaced.

The parties have been in mediation under the auspices of the National Mediation Board (NMB) for over a year without coming close to an agreement. There is no reason to believe that they will do any better under another Board, the PEB, during the short timeframe set forth in the legislation. The Board has no power to mandate a solution. It can only recommend. In all likelihood, the recommendations of the PEB would be rejected by one or both of the parties. This would put the dispute right back to where it is now, with an airline that is much weaker for having to endure the further delay.

Of course, Congress could always make the PEB's recommendations mandatory by enacting legislation to that effect. But that would put it in the awkward position of forcing a resolution that management feels would bankrupt the company or that labor would refuse to live with, or both. In that event, the intolerable labor-management situation at Eastern would simply be perpetuated. In this connection, it is important to note that neither Eastern nor the machinist's union have agreed to be bound by the recommendations of the PEB.

Moreover, the unions have made it quite clear that the real problem here is Frank Lorenzo, the head of Eastern's parent, Texas Air. If Frank Lorenzo is their problem, a PEB cannot be their solution. Whatever this Board can accomplish, it cannot change Eastern's ownership. Therefore, even if its recommendations were accepted, the source of all the employees' anger would still remain.

On March 9, 1989, the company filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code. Eastern's present intentions are to operate the shuttle and several South American routes. This new development in the labor dispute has further complicated a very complex set of labor questions which we frankly do not believe a Presidential Emergency Board would be prepared to deal with. Furthermore, in our opinion, there are simply too many unanswered legal questions which have arisen because of the bankruptcy to proceed at this time.

The bill requires, pursuant to Section 10 of the RLA, that during the investigation by the board and for the cooling off period that follows its report, no change, except by consent of the parties, "shall be made . . . in the conditions out of which the dispute arose" (45 U.S.C. 160). In other words, union employees are eligible for the same wages and working conditions that were in effect prior to the strike.

The Committee has scrambled to report this legislation without making an adequate analysis of its effects on the requirement for a return to the status quo. Enactment of this legislation could pose both legal and practical problems for a prompt resolution of the dispute.

It is unclear what a return to the status quo means with respect to the rights of the workers. It is our understanding that the company intends to honor the expired contracts of the Airline Pilots Association (ALPA) and the Transport Workers Union (TWU). However, under the provisions of the RLA, the company is now free to pay the International Association of Machinists' (IAM)

members whatever it sees fit and has the right to change working conditions. The machinists' pay, of course, is the major issue in this dispute.

Does this legislation require the company to bring all workers back at full pay whether or not there is a job for them to perform? Or, does the company bring them back and go through furlough procedures to lay them off. Currently, the company is operating about six percent of the normal number of flights. Obviously, it will take time for the company to put additional flights in service. If pilots are brought back on an as-needed basis, what are the seniority rights of these workers? Do pilots have to be retrained to fly different aircraft because of seniority requirements? If this is the case, retraining will take time.

These same questions could be posed for the flight attendants, machinists, baggage handlers, and cleaners. If the company must bring all workers back immediately, whether or not there is a job for them to do, there may be serious adverse economic consequences to this bankrupt carrier.

Also, there is the question of potential constitutional infirmities. It is unclear whether this legislation would survive scrutiny under Article I, section 8, clause 4 of the U.S. Constitution which gives Congress the power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The recent case of *Railway Labor Executives Association* v. *Gibbons*, 455 U.S. 457 (1982), raises substantial questions about its applicability to the situation at Eastern Air Lines. In that case, Congress passed legislation requiring the Rock Island Railroad, which had filed for reorganization under the bankruptcy laws, to pay benefits to certain employees. The Supreme Court concluded that the uniformity requirement of the U.S. Constitution prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of only one named regional debtor.

Arguably, we may be violating this holding if we enact H.R. 1231 because the legislation requires that a specific company, Eastern Air Lines, which is in bankruptcy, return its employees to the wages and working conditions that existed prior to the strike.

Also, there are questions as to whether we are, in effect, modifying the rights of a Bankruptcy Judge to adjust collective bargaining agreements under the U.S. Bankruptcy Code. Today, the company is free to unilaterally set wages and working conditions for the members of the machinists union. This legislation, however, would obviously require a higher wage than what the company would be willing to pay today. The question is: does this return to the status quo affect or override the power of a Bankruptcy Judge to carry out his authority to change the terms, conditions, wages, benefits, or work rules for employees?

It can also be argued that the legislation constitutes an uncompensated taking of private property for a public purpose in violation of the Just Compensation Clause of the 5th Amendment. Courts have held that a "taking" occurs when three conditions exist: (1) the required action imposes a severe economic impact on the claimant; (2) it substantially interferes with financial expectations; and (3) the governmental action appropriates the claimants property for a public use. *Penn Central Transportation Co.* v. *New*

*York City,* 438 U.S. 104 (1978). Certainly, these three conditions appear to exist with respect to Eastern.

Today, the company has implemented a wage scale below that which existed before the strike. If a Presidential Emergency Board is established and workers are returend to the pre-strike status quo, it can be argued that the IAM members are accorded a status in the bankruptcy proceeding that they do not now enjoy because they will be receiving much higher wages by the operation of the legislation. These wage levels are, of course, a major reason for the financial straits the company is in. This is certainly contrary to the expectations of the company and amounts to a governmental taking of the estate's assets to pay employees a higher wage.

Also, a related issue is whether this could potentially affect the rights of creditors in any liquidation situation and whether irreparable damage to the estate may result through a legislative requirement to return to the status quo. Conceivably, this may present a "taking" which requires the government to compensate the company.

In short, we believe that the best way to resolve this dispute and save Eastern Air Lines is to have both sides come together at the bargaining table and reach a mutually acceptable resolution. The only way this will ever happen is by the pressure put on the parties through the process of self-help and strikes that we have now reached. We recognize that this is a painful process for many. But it is a necessary one. The establishment of a PEB would only drag out this process that much longer.

We recognize that this bill would shorten the 60-day delay that is typical in Railway Labor Act cases but we believe this presents a false hope. Even under the 30-day limit in the current law, the average duration of a hearing involving past airline emergency boards was 75 days. One took 200 days. It is not realistic to expect the emergency board in this case to complete its work in the 14 or 19 days contemplated by H.R. 1231.

That is especially true here where the board would have to evaluate the cases of not just one but three unions, two of which have not even completed the negotiating process. And its task is further complicated by the fact that the company is in bankruptcy.

It should also be pointed out that this legislation would establish a questionable precedent because ALPA and TWU have not negotiated to the stage of impasse requiring the intervention of the NMB. In other words, this legislation bypasses the regular procedure for collective bargaining and mediation by requiring a PEB for two unions whose labor situation is not ripe for consideration by such an emergency board. This totally distorts the RLA process and may set the stage for further legislation and Congressional intervention in labor disputes before the collective bargaining process has had the chance to run its course.

It may be that Eastern will not survive. It will almost certainly not survive as we knew it. But if it dies, it should die as a result of its own failures, those of its management and its employees, and not because of ill-conceived government intervention.

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